No. 84-1728

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In the Supreme Court of the United States

OCTOBER TERM, 1985

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY
AND AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO,
NATIONAL COUNCIL OF EEOC LOCALS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT FEDERAL LABOR RELATIONS AUTHORITY

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QUESTION PRESENTED

Whether a collective bargaining proposal that does not substantively limit the authority of a federal agency, in accordance with applicable laws, to make determinations with respect to contracting-out, but instead does no more than restate an agency's existing obligation to comply with requirements in Office of Management and Budget Circular A-76 and other applicable laws and regulations concerning contracting-out, is within the duty to bargain under the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101-7135.

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BRIEF FOR THE RESPONDENT FEDERAL LABOR RELATIONS AUTHORITY

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 744 F.2d 842. The decision and order of the Federal Labor Relations Authority (Pet. App. 40a-48a) is reported at 10 F.L.R.A. 3; the Authority's denial of the Equal Employment Opportunity Commission's request for recommendation is reported at 11 F.L.R.A. 720 (FLRA App. 1a-2a).

JURISDICTION

The Authority issued its decision and order on September 2, 1982. The Equal Employment Opportunity Commission requested reconsideration of that decision on September 16, 1982. On November 1, 1982, EEOC filed a petition for review of the Authority's decision and order in the court of appeals; on December 8, 1982, the Authority filed a cross-application for enforcement. On March 18, 1983, the Authority issued an order

denying EEOC's request for reconsideration of the Authority's decision and order.

The judgment of the court of appeals was entered on September 21, 1984 and a timely petition for rehearing was denied on December 3, 1984. On February 26, 1985, the Chief Justice extended the time within which to file a petition for a writ of certiorari to May 2, 1985. The petition was filed on that date and was granted on June 24, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant portions of the Federal Service Labor-Management Relations Statute, as amended, 5 U.S.C. 7101-7135 (1982 & Supp. II 1984) are reproduced in the appendix to this brief (FLRA App. 3a-6a).

STATEMENT

A. The Statutory Scheme For Resolving Negotiability Appeals In The Federal Sector

Labor-management relations in the federal service are governed by the Federal Service Labor-Management Relations Statute ("the Statute"), as amended, 5 U.S.C. 7101-7135 (1982 & Supp. II 1984). The Statute was enacted as section 701 of the Civil Service Reform Act of 1978.[1] Under the Statute, the responsibilities of the Federal Labor Relations Authority ("the Authority"), a three-member independent and bipartisan body within the Executive Branch, include, among other things, adjudicating collective bargaining disputes and providing leadership in establishing policies and guidance relating to matters arising under the Statute. 5 U.S.C. 7104-7105. The Authority performs a role analogous to that of the National Labor Relations Board ("NLRB") in the private sector. *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. 89, 92-93 (1983); *Federal/Postal/Retiree*

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[1] Pub. L. No. 95-454, 92 Stat. 1111 (1978). Prior to the enactment of the Statute, labor-management relations in the federal service were governed by a program established in 1962 by Executive Order No. 10988, 3 C.F.R. 521 (1959-1963 comp.). The Executive Order program was revised and continued by Exec. Order No. 11491, 3 C.F.R. 861 (1966-1970 comp.), as amended by Exec. Orders Nos. 11616, 11636, and 11838, 3 C.F.R. 605, 634, 957 (1971-1975 comp.).

Coalition v. *Devine,* 751 F. 2d 1424, 1430 (D.C. Cir. 1985). Congress intended the Authority, like the NLRB, "to develop specialized expertise in its field of labor relations and to use that expertise to give content to the principles and goals set forth in the [Statute]." *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA,* 464 U.S. at 97.

Under the Statute, a federal agency must bargain in good faith with the exclusive representative of an appropriate bargaining unit about unit employees' conditions of employment. 5 U.S.C. 7103(a)(12), 7114(b)(2). The term "conditions of employment" is defined as "personnel policies, practices and matters, whether established by rule, regulation, or otherwise, affecting working conditions * * * ." 5 U.S.C. 7103(a)(14). However, there is no duty to bargain over contract language which would bring about an inconsistency with a federal law, government-wide rule or regulation, or an agency regulation for which a compelling need exists. 5 U.S.C. 7117(a).

The Statute also contains a management rights clause that removes the exercise of certain management authority from the scope of negotiations. 5 U.S.C. 7106. As here pertinent, the Statute reserves as nonnegotiable, subject to subsection (b) of Section 7106, the authority of management "in accordance with applicable laws * * * to make determinations with respect to contracting out." 5 U.S.C. 7106(a)(2)(B); *NFFE, Local 1167* v. *FLRA,* 681 F.2d 886, 892 (D.C. Cir. 1982). Subsection (b) of Section 7106 provides in relevant part that nothing in Section 7106 shall preclude an agency and an exclusive representative from negotiating procedures which management officials of the agency will observe in, and appropriate arrangements for employees adversely affected by, the exercise of any authority by management officials under Section 7106. 5 U.S.C. 7106(b)(2) and (3); see *AFGE, Local 2782* v. *FLRA,* 702 F.2d 1183 (D.C. Cir. 1983).

In the instant case, the Authority adjudicated a dispute over whether a collective bargaining proposal is within the duty to bargain established by the Statute. 5 U.S.C. 7105(a)(2)(E), 7117(c). Under the Statute, if a federal agency alleges that a bargaining proposal is outside the duty to bargain, the exclusive representative may appeal the agency's allegation of

nonnegotiability to the Authority. 5 U.S.C. 7117(c).[2] The Authority examines the disputed proposal based on the record presented to it by the parties. *NFFE, Local 1167* v. *FLRA*, 681 F.2d at 891. If the Authority finds the proposal within the duty to bargain, the Authority orders that the agency upon request, or as otherwise agreed to by the parties, bargain over the proposal. 5 C.F.R. 2424.10. The Authority's decision addresses only the negotiability of the bargaining proposal; the Authority neither considers the merits of the proposal nor orders the agency to agree to it. *Department of Defense* v. *FLRA*, 659 F.2d 1140, 1147 (D.C. Cir. 1981), cert. denied, 455 U.S. 945 (1982).

The bargaining obligation imposed by the Statute does not require the agency to agree to the proposal or to make a concession. 5 U.S.C. 7103(a)(12). If the parties, in the course of their collective bargaining, reach an impasse, either party may request the assistance of the Federal Service Impasses Panel. 5 U.S.C. 7119(b). The Impasses Panel is empowered to take whatever action is necessary and not inconsistent with the Statute to resolve an impasse, including ordering parties to agree to specific proposal language. See 5 U.S.C. 7119(c)(5)(B)(iii). See also *e.g.*, *Council of Prison Locals* v. *Brewer*, 735 F.2d 1497, 1501 (D.C. Cir. 1984); *Department of the Treasury* v. *FLRA*, 707 F.2d 574, 577 n.7 (D.C. Cir. 1983). The Impasses Panel will consider the reasonableness of any proposal at issue in determining what contract language will be imposed. *E.g., Department of the Air Force, 341st Combat Support Group, Malmstrom Air Force Base, Montana and Local 2609, AFGE*, Case No. 82 FSIP 142 (1983) slip op. 2; see also *Veterans Administration Medical Center, Tampa, Florida* v. *FLRA*, 675 F.2d 260, 265 n.9 (11th Cir. 1982).

The Statute requires that, at the request of either party, the product of collective bargaining negotiations be reduced to a written collective bargaining agreement. 5 U.S.C. 7103(a)(12), 7114(b)(5). Such a collective bargaining agreement must

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[2] If the exclusive representative wishes to appeal, it first obtains a written allegation of nonnegotiability from the agency. 5 C.F.R. 2424.3. The exclusive representative then files a petition seeking the Authority's determination of the negotiability issue. 5 C.F.R. 2424.4. The agency is served with a copy of this petition, to which it may respond with a statement either withdrawing its allegation that the proposal is nonnegotiable or setting forth reasons supporting its position of nonnegotiability. 5 C.F.R. 2424.6(a)(2). The exclusive representative then has a right to respond to the agency's statement of position. 5 C.F.R. 2424.7.

"provide procedures for the settlement of grievances, including questions of arbitrability." 5 U.S.C. 7121(a)(1). Absent agreement otherwise by the parties, the Statute defines broadly the kinds of disputes that are grievable under a negotiated grievance procedure. 5 U.S.C. 7103(a)(9) and 5 U.S.C. 7121(a). See *AFGE, Locals 225, 1504, and 3723* v. *FLRA*, 712 F.2d 640, 641-642 (D.C. Cir. 1983). The Statute "is virtually all-inclusive in defining 'grievance' ";[3] Section 7121 lists only five subject matters that are statutorily excluded from the permissible scope of the negotiated grievance procedure.[4]

B. The Proceedings Before The Authority

During the course of collective bargaining agreement negotiations with the Equal Employment Opportunity Commission ("EEOC"), the American Federation of Government Employees, AFL-CIO, National Council of EEOC Locals ("AFGE") proposed the following contract provision:

> The EMPLOYER agrees to comply with OMB Circular A-76, and other applicable laws and regulations concerning contracting-out.[5]

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[3] H.R. Rep. 95-1403, 95th Cong., 2d Sess. 40 (1978), *reprinted in* Subcomm. on Postal Personnel and Modernization of the House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess., *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, at 686 (Comm. Print No. 96-7) *(Legis. Hist.)*.

[4] The five subject matters excluded are:

(1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);

(2) retirement, life insurance, or health insurance;

(3) a suspension or removal under section 7532 of this title;

(4) any examination, certification, or appointment; or

(5) the classification of any position which does not result in the reduction in grade or pay of an employee.

5 U.S.C. 7121(c). See, *e.g.*, *The Veterans Administration Medical Center, Togus, Maine and AFGE, Local 2610*, 17 F.L.R.A. No. 129 (1985); *Federal Aviation Administration, Department of Transportation, Tampa, Florida and Federal Aviation Science and Technological Association, NAGE, Tampa, Florida*, 8 F.L.R.A. 532 (1982). Parties can, in negotiations, agree to exclude additional matters. 5 U.S.C. 7121(a)(2).

[5] OMB Circular A-76 ("the Circular") applies to Executive agencies and provides direction for agency decisions whether to contract-out to private enterprise for products and services the government needs. 44 Fed. Reg. 20556 (1979), as amended by 45 Fed. Reg. 69322 (1980); 47 Fed. 6511 (1982); *id.* at 46783; 48 Fed. Reg. 37114 (1983); 50 Fed. 32812 (1985).

(Pet. App. 40a.) EEOC alleged that the proposal was nonnegotiable and refused to bargain over it (*ibid.*). To resolve the dispute, AFGE sought a negotiability determination from the Authority pursuant to 5 U.S.C. 7117(c) (*ibid.*). Upon consideration of the record before it, the Authority issued a decision finding the proposal negotiable (Pet. App. 40a-48a).

The Authority determined that the proposal did not impair EEOC's right to make contracting-out determinations because the proposal would not impose any substantive limitations upon management's right to make contracting-out determinations apart from those already existing (Pet. App. 41a). The Authority distinguished this proposal from one it had found nonnegotiable in *NFFE, Local 1167 and Department of the Air Force Headquarters, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida*, 6 F.L.R.A. 574 (1981), aff'd as to other matters *sub nom. NFFE, Local 1167* v. *FLRA*, 681 F.2d 886 (D.C. Cir. 1982). In that case the proposal would have required the agency to comply with the specific terms of OMB Circular A-76 regardless of whether the Circular were to be revised or rescinded (Pet. App. 41a). By locking management into observing specific terms in the Circular, the Authority stated in that case, the proposal impermissibly would have imposed its own limitations on management's right (*ibid.*). The instant proposal, however, simply obligated EEOC to act in accordance with whatever laws and regulations may be extant at the time EEOC exercises its right to contract-out and therefore the proposal did not narrow the scope of the discretion the Statute reserved to EEOC as nonnegotiable (*ibid.*).

The Authority also rejected EEOC's claim that because the proposal would subject grievances concerning the application of the Circular to the negotiated grievance procedure, the proposal conflicted with the Circular and was thus nonnegotiable (Pet. App. 42a). The Authority, quoting *AFGE, Local 2782 and Department of Commerce, Bureau of the Census, Washington, D.C.*, 6 F.L.R.A. 314, 322 (1981), stated that government-wide "regulations . . . may not be applied in a manner inconsistent with the scope of negotiated grievance procedures allowed under section 7121 of the Statute" (*ibid.*). In this regard, the Authority noted that the Statute and its legislative history require that grievance procedures negotiated under Section 7121 cover all matters that under provisions of law could be submitted to the

grievance procedure unless the parties exclude them through bargaining (*ibid.*). Accordingly, the Authority concluded that even assuming that a conflict existed between the proposal and the Circular, the Circular cannot limit "the *statutorily* prescribed scope and coverage of the parties' negotiated grievance procedure" (Pet. App. 42a; emphasis in decision).

Finally, the Authority noted that, to the extent EEOC had argued that the proposal would change the scope and coverage of the parties' negotiated grievance procedure, EEOC had misinterpreted the legal effect of the proposal (Pet. App. 42a). The Authority stated that even in the absence of the proposed contract provision, under the Statute disputes concerning conditions of employment arising in connection with the application of the Circular would be covered by the negotiated grievance procedure unless a particular grievance is inconsistent with law (see *AFGE, Local 3403 and National Science Foundation, Washington, D.C.*, 6 F.L.R.A. 669, 673 (1981)) or unless the parties exclude such grievances through negotiations (see, *e.g.*, *AFGE, Local 3354 and U.S. Department of Agriculture, Farmers Home Administration, St. Louis, Missouri*, 3 F.L.R.A. 320 (1980)) (*ibid.*).

EEOC sought reconsideration of the Authority's decision, requesting in part that the Authority "explain in what fashion OMB Circular A-76 and other applicable laws and regulations concerning contracting out fall within the ambit of . . . the grievance resolution machinery under the Statute" (FLRA App. 2a). The Authority denied the request, finding that EEOC in essence was asking the Authority to make arbitrability determinations in the absence of a specific factual context (FLRA App. 2a). The Authority noted that, to the extent that arbitrability questions may arise in the future, EEOC could file exceptions to specific arbitration awards as provided in Section 7121 of the Statute (*ibid.*).

C. The Decision And Order Of The Court Of Appeals

In an opinion by Judge Tamm, the court of appeals (Senior Judge MacKinnon, dissenting) upheld the Authority's decision and enforced the Authority's order (Pet. App. 1a-37a). The court, citing this Court's decision in *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. 89, 97 (1983), stated at the outset that "the Authority is entitled to 'considerable deference' when

interpreting and applying the [Statute's] provisions to specific situations" (Pet. App. 7a; see also Pet. App. 7a n.11).

The court rejected EEOC's argument that the Statute's management rights clause gives management unfettered authority to make contracting-out determinations and that any bargaining proposal regarding contracting-out would restrict that authority (Pet. App. 8a-11a). The court found that the Statute's language plainly requires management to exercise its authority "in accordance with applicable laws" (Pet. App. 8a). Since the bargaining proposal essentially echoed the statutory requirement that contracting-out determinations be made in accordance with applicable laws, the court agreed with the Authority's conclusion that the proposal, which did not itself establish any substantive criteria guiding management's contracting-out determinations, did not affect the scope of that authority reserved to management by the Statute (Pet. App. 9a).

Second, the court rejected EEOC's argument that adoption of the proposal would invade management's rights by subjecting management's contracting-out determinations to the negotiated grievance procedure (Pet. App. 11a-16a). The court noted that this argument assumes that a complaint asserting that a contracting-out determination was not made in accordance with applicable laws, including the Circular, would not be grievable in the absence of the contract proposal (Pet. App. 11a-12a). Such an assumption, the court found, was "contrary to the text" of the Statute, which "expansively defines the subjects covered under the [statutorily created negotiated] grievance procedure" (Pet. App. 12a). In this regard, the court noted that under the Statute, "[o]nly five subjects, not including the subject of contracting-out, are expressly excluded from coverage under the grievance mechanism" (Pet. App. 12a; footnote omitted).[6]

Finally, the court rejected EEOC's argument that the language of the Circular (that its provisions "shall not be construed to create" any right of appeal except as provided in the Circular itself) renders the proposal nonnegotiable (Pet. App. 16a-17a).

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[6] The court also rejected EEOC's argument that all prerogatives reserved to management under the management rights clause are excluded from the scope of matters grievable (Pet. App. 14a-15a). In this connection, the court referred to the legislative history of the Statute which stated that management's reserved right to "remove" employees "would in no way affect the employee's right to appeal the decision * * * through the procedures set forth in a collective bargaining agreement." (Pet. App. 15a, citing 124 Cong. Rec. 29183 (1978), *reprinted in Legis. Hist.* at 924.)

First, the court noted that the proposal is not inconsistent with the Circular because the proposal does not "create" a new appeal right (Pet. App. 16a). Rather, as the court had already determined, the right to file grievances regarding contracting-out decisions is created by the Statute, not by the proposal (*ibid.*). Second, and "more important[ly]," even if the proposal were inconsistent with the Circular, "[t]here is no indication in the [Statute] or elsewhere of a congressional intent to allow agencies to limit by regulation the statutorily defined grievance procedure" (*ibid.*). The court concluded that to allow the text of the Circular to restrict the scope of grievances would place "limitations in the statute not placed there by Congress." (Pet. App. 16a-17a, quoting *Colgate-Palmolive Peet Co.* v. *NLRB*, 338 U.S. 355, 363 (1949).)

The court of appeals denied EEOC's petition for rehearing and its suggestion for rehearing en banc (Pet. App. 38a-39a).

SUMMARY OF ARGUMENT

Construing the duty to bargain under the Federal Service Labor-Management Relations Statute is a "task[ ] lying at the heart of the [Authority's] function." *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 497 (1979). In this case, the Authority determined that a bargaining proposal which simply restates EEOC's obligation to do that which it must do in any event—make contracting-out determinations in compliance with OMB Circular No. A-76 and other applicable laws and regulations—is within the statutory duty to bargain. The hallmark of the Authority's decision is consistency—consistency with the literal terms of the Statute, consistency with congressional intent as evinced in the Statute and its legislative history, consistency with traditional principles of labor law, and consistency with Authority decisional precedent on what is and is not within the duty to bargain in the federal sector. The Authority's decision, enforced by the court of appeals below, warrants affirmance by this Court.

A. The Statute reserves to management the nonnegotiable substantive authority, subject to 5 U.S.C. 7106(b)(2) and (3) and "in accordance with applicable laws," to make determinations with respect to contracting-out. Thus, management's contracting-out authority is not boundless. That authority is "subject to" the negotiation of procedures which management will observe

in exercising its right to contract-out and the negotiation of appropriate arrangements for employees adversely affected by the exercise of the right. Further, that authority must be exercised in accordance with any existing laws and regulations that govern the exercise of that authority. Consequently, a bargaining proposal is not nonnegotiable simply because it mentions a subject matter that is a management right. Instead, an inquiry must be made to determine what impact, if any, the proposal would have on management's exercise of its reserved authority. 5 U.S.C. 7106(a).

In making such an inquiry, the Authority has distinguished between proposals that only reiterate management's obligation to act in accordance with applicable legal requirements and proposals that add restrictions to management's exercise of its authority. Bargaining proposals that do no more than restate management's obligation to adhere to whatever legal and regulatory requirements may be extant at the time management exercises its Section 7106(a)(2) rights are within the duty to bargain. On the other hand, proposals that would impose substantive limitations of their own making on the exercise of management rights are not within the duty to bargain. The Authority has consistently applied this distinction in resolving disputes about the negotiability of proposals that address contracting-out as well as other rights covered in Section 7106(a)(2) of the Statute.

The Authority properly applied these principles to the proposal in this case, which simply restates EEOC's obligation to comply with applicable laws and regulations when it exercises its authority to contract-out. The proposal therefore reserves to EEOC the full range of discretion available to it under law, which is precisely the same range of discretion reserved to EEOC under the Statute. Thus, as found by the Authority and as affirmed by the court of appeals, any limitations on EEOC's contracting-out authority stem not from the proposal but from external legal requirements with which EEOC is obligated to comply in any event. Because the proposal in this case does not impose any substantive limitation on EEOC, it is within the duty to bargain.

B.1. Congress mandated that every collective bargaining agreement under the Statute contain a negotiated grievance procedure which includes binding arbitration. 5 U.S.C. 7121(a). The term "grievance" is broadly defined to include, among other things, any complaint by any employee concerning "any matter relating

to the employment of the employee" (5 U.S.C. 7103(a)(9)(A)) or "any claimed violation, misinterpretation, or misapplication of any law, rule or regulation affecting conditions of employment" (5 U.S.C. 7103(a)(9)(C)(ii)).

Petitioner's argument that the proposal would improperly bring contracting-out decisions within the scope of the negotiated grievance procedure does not square with the terms of the Statute. Unless the parties in negotiations agree otherwise, Congress prescribed those matters which are to be submitted as a matter of law to the negotiated grievance procedure. 5 U.S.C. 7121 and 7103(a)(9); H.R. Conf. Rep. 95-1717, 95th Cong., 2d Sess. 157 (1978). Congress exempted by law only five subject-matters from the permissible scope of the negotiated grievance procedure; contracting-out was not one of the five exempted. 5 U.S.C. 7121(c); H.R. Rep. 95-1403, 95th Cong., 2d Sess. 40 (1978). Thus, even in the absence of the proposal, disputes over contracting-out are within the permissible scope of the negotiated grievance procedure unless the parties decide to exclude them.

Nonetheless, EEOC argues that by designating a subject as a management right, Congress intended not only to take that subject outside the duty to bargain but to remove it from the scope of the negotiated grievance procedure as well. But as is evident from EEOC's acknowledgment that grievances over discipline and promotions are permissible, even though discipline and promotions are management rights, the management rights provision of the Statute does not also operate to remove the specified rights from the scope of the negotiated grievance procedure. The legislative history demonstrates that Congress intended the management rights provision only to preclude bargaining, and then only with respect to proposals which improperly intrude upon the exercise of the right; the management rights provision does not address what matters can or cannot be grieved under the negotiated grievance procedure.

Of course, nothing in the Statute precludes EEOC or any other employing agency from proposing in collective bargaining to exclude contracting-out matters from the scope of the grievance procedure. Indeed, Congress expressly permitted parties to negotiate for the exclusion of any matter from the Statute's broad-scope negotiated grievance procedure. 5 U.S.C. 7121(a)(2); *AFGE, Locals 225, 1504, and 3723* v. *FLRA*, 712 F.2d 640 (D.C. Cir.1983).

2. Petitioner's alternative argument that contracting-out should be exempt from coverage under the Statute's grievance mechanism because it is different in character from other management rights ignores the fact that the Statute makes no such distinction. Further, the legislative history gives no indication that when Congress reserved to management as nonnegotiable the substantive authority to contract-out, it intended contracting-out to be the one Section 7106(a)(2) right over which grievances were to be impermissible.

EEOC also argues that the portion of the bargaining proposal that would permit grievances over violations of the Circular is inappropriate because the Circular is not a rule or regulation, but merely a policy directive which does not limit management's discretion in any meaningful sense. This argument emphasizes the discretionary aspects of the Circular, ignores the mandatory aspects, and disregards the fact, acknowledged by EEOC, that the Circular requires EEOC's compliance. Moreover, insofar as EEOC's argument goes to the nature of the review to be given EEOC's exercise of the discretionary aspects of the Circular, the Authority's precedent clearly demonstrates that arbitrators may not substitute their judgment for the exercise of management discretion in areas reserved to management by Section 7106, including contracting-out.

C. Finally, EEOC errs in asserting that the Circular itself operates to curtail the permissible reach established by Congress for the negotiated grievance procedure. EEOC's argument that Section 7117(a)(1) of the Statute bars negotiation over proposals simply because they happen to share the same subject matter as a government-wide rule or regulation is incorrect because Section 7117(a)(1) only bars negotiation over proposals which would bring about an inconsistency with government-wide rules or regulations like the Circular. EEOC argues in the alternative that there is an inconsistency between the Circular and the proposal and, under Section 7117(a)(1), this inconsistency should bar negotiation over the proposal. However, even assuming that coverage of contracting-out disputes under the negotiated grievance procedure is inconsistent with the terms of the Circular, the Statute's establishment of a right to a broad-scope negotiated grievance procedure can not be restricted by the Circular. To allow the Circular to limit the statutory scope of grievances would place "limitations in the statute not placed there by Congress." *Colgate-Palmolive Peet Co.* v. *NLRB*, 338 U.S. 355, 363 (1949).

ARGUMENT

A COLLECTIVE BARGAINING PROPOSAL THAT DOES NOT ESTABLISH ANY SUBSTANTIVE LIMITATION ON A FEDERAL AGENCY'S RIGHT, IN ACCORDANCE WITH APPLICABLE LAWS, TO MAKE DETERMINATIONS WITH RESPECT TO CONTRACTING-OUT, BUT INSTEAD SIMPLY RESTATES AN AGENCY'S EXISTING OBLIGATION TO COMPLY WITH REQUIREMENTS IN APPLICABLE LAWS AND REGULATIONS CONCERNING CONTRACTING-OUT, IS WITHIN THE DUTY TO BARGAIN UNDER THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

A. The Statute Precludes Bargaining Over Proposals That Would Substantively Limit The Exercise Of Authority Reserved To Management, Not Over A Proposal That Only Restates Management's Undisputed Obligation To Comply With Applicable Laws and Regulations

The duty to bargain in the federal sector extends generally to "conditions of employment," which include "personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions * * *." 5 U.S.C. 7103(a)(14); *Department of Defense* v. *FLRA*, 659 F.2d 1140, 1143 n.2 (D.C. Cir. 1981), cert. denied, 455 U.S. 945 (1982). Absent other considerations, bargaining proposals falling within the ambit of this definition are within the duty to bargain. See *AFGE, Local 32 and Office of Personnel Management, Washington, D.C.*, 6 F.L.R.A. 423, 423-424 (1981), enf'd *sub nom. Office of Personnel Management* v. *FLRA*, 706 F.2d 1229 (D.C. Cir. 1983). See also *Library of Congress* v. *FLRA*, 699 F.2d 1280, 1283-1286 (D.C. Cir. 1983); *Department of Defense, Department of the Army* v. *FLRA*, 685 F.2d 641, 644 (D.C. Cir. 1982). The duty to bargain under the Statute does not encompass proposals that are inconsistent with federal law or applicable regulation (5 U.S.C. 7117(a)) or proposals that improperly intrude on the authority of management officials of an agency to exercise the rights enumerated in Section 7106(a) of the Statute

(5 U.S.C. 7106(a)). *Department of Defense* v. *FLRA*, 659 F.2d at 1143 n.3, 1146.[7]

Among the rights the Statute reserves to management is the authority "in accordance with applicable laws • • • to make determinations with respect to contracting-out[.]" 5 U.S.C. 7106(a)(2)(B). This management right was first included in the bill reported out of the House Committee. H.R. 11280, 95th Cong., 2d Sess. § 7106(a)(2)(B) (1978), *reprinted in Legis. Hist.* at 391. The House adopted this as one of the management rights. 124 Cong. Rec. 29176, 29221 (1978), *reprinted in Legis. Hist.* as 911, 966. The Senate bill did not include a management right to contract-out, and in the Conference Committee the Senate receded to its inclusion in the Statute. H.R. Conf. Rep. 95-1717, 95th Cong., 2d Sess. 154 (1978), *reprinted in Legis. Hist.* at 822.[8]

Just as it has held with respect to the other rights listed in Section 7106(a)(2),[9] the Authority has recognized consistently that the Statute reserves to management as nonbargainable the substantive exercise of its authority to make contracting-out determinations. The Authority's first and lead decision in this area

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[7] Proposals concerning certain matters, set forth in Section 7106(b)(1) of the Statute, are negotiable only at the election of the agency. 5 U.S.C. 7106(b)(1). See *New York Council, ACT* v. *FLRA*, 757 F.2d 502, 508 (2d Cir. 1985), cert. denied, No. 85-106 (Oct. 7, 1985).

[8] The right to contract-out was not specifically listed as a separate management right under the Executive Order program. However, in *Tidewater Virginia Federal Employees Metal Trades Council and Naval Public Works Center, Norfolk, Virginia*, 1 F.L.R.C. 431, 440 (1973), a proposal restricting the factors an agency could rely on in reaching a contracting-out decision, and thus "proscribing management action based on OMB Circular A-76," was found nonnegotiable by the Federal Labor Relations Council ("the Council"). The Council found that the proposal conflicted with management's rights, under Section 12(b)(5) of Executive Order 11491, to determine the methods, means, and personnel by which agency operations were to be conducted. 1 F.L.R.C. at 440-441. However, the Council's decision also stated that "proposals to establish procedures which management would observe leading to the exercise of the retained management rights under 12(b)(5) would be negotiable to the extent they do not interfere with the exercise of the rights themselves." 1 F.L.R.C. at 442.

[9] With respect to the right to hire, see *NTEU and IRS*, 2 F.L.R.A. 281 (1979); the right to assign work and direct employees, see *NTEU and Department of the Treasury, Bureau of the Public Debt*, 3 F.L.R.A. 769 (1980), aff'd *sub nom. NTEU* v. *FLRA*, 691 F.2d 553 (D.C. Cir. 1982); the right to layoff employees, see *NTEU and IRS*, 7 F.L.R.A. 275, 286-288 (1981); the right to

is *NFFE, Local 1167 and Department of the Air Force, Headquarters, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida*, 6 F.L.R.A. 574 (1981), aff'd *sub nom. NFFE, Local 1167 v. FLRA*, 681 F.2d 886 (D.C. Cir. 1982). Since then, the Authority consistently has found nonnegotiable proposals which would impose substantive limitations on the exercise of management's contracting-out authority. *E.g., AFGE, Local 2736 and Department of the Air Force, Headquarters 379th Combat Support Group (SAC), Wurtsmith Air Force Base, Michigan*, 14 F.L.R.A. 302 (1984) (proposals 1 and 2); *IAM and AW, Local 2424 and Department of the Army, Aberdeen Proving Ground, Maryland*, 8 F.L.R.A. 679 (1982) (proposals 3 and 4); *AFGE, Local 3403 and National Science Foundation, Washington, D.C.*, 6 F.L.R.A. 669 (1981) (proposal 3).[10] However, as the Authority correctly found and the court of appeals properly affirmed, the Statute does not automatically render nonnegotiable *all* proposals regarding contracting-out, and management's discretion in this area is not unfettered (Pet. App. 8a).

First, management must make its contracting-out determinations in accordance with any existing laws and regulations that govern the exercise of such authority. This proposition is not

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discipline employees, see *PATCO and FAA*, 5 F.L.R.A. 763 (1981); the right to assign work, see *NTEU and Department of the Treasury, IRS*, 6 F.L.R.A. 508, 517-518 (1981); the right to determine the personnel by which agency operations shall be conducted, see *NFFE, Locals 1707, 1737 and 1708 and Headquarters, Louisiana Air and Army National Guard, New Orleans, Louisiana*, 9 F.L.R.A. 148 (1982); the right to make selections for appointments, see *Immigration and Naturalization Service, Eastern Regional Office (Burlington, Vermont)*, 18 F.L.R.A. No. 103 (1985) slip op. 8; and the right to take whatever actions may be necessary to carry out the agency mission during emergencies, see *ACT, Inc., Pennsylvania State Council and the Adjutant General, Department of Military Affairs, Commonwealth of Pennsylvania*, 7 F.L.R.A. 346, 348-350 (1981).

[10] See also *AFGE, Local 1546 and Department of the Army, Sharpe Army Depot, Lathrop, California*, 19 F.L.R.A. No. 118 (1985) (provision 2); *AFGE, Local 12 and Department of Labor*, 18 F.L.R.A. No. 58 (1985) (proposal 6); *AFGE, Local 1923 and Health Care Financing Administration, Baltimore, Maryland*, 17 F.L.R.A. No. 96 (1985); *AFGE, Local 1622 and The Directorate Facilities and Engineering Department of the Army, Fort George G. Meade, Maryland*, 17 F.L.R.A. No. 69 (1985).

merely self-evident.[11] The plain language of the Statute states that management is reserved the authority "in accordance with applicable laws * * * to make determinations with respect to contracting out." 5 U.S.C. 7106(a)(2)(B).[12]

Second, Section 7106(a) of the Statute makes this management authority "[s]ubject to" Section 7106(b)(2) and (3), which provides for the negotiation of procedures which management will observe in exercising its right to contract-out and "appropriate arrangements" for employees adversely affected by the exercise of the right. 5 U.S.C. 7106(b)(2) and (b)(3). See, *e.g.*, *AFGE, Local 2782* v. *FLRA*, 702 F.2d 1183, 1185 (D.C. Cir. 1983); *NFFE, Local 1167* v. *FLRA*, 681 F.2d 886, 892 (D.C. Cir. 1982); *Department of Defense* v. *FLRA*, 659 F.2d 1140, 1146 and n.28, 1151, 1153 (D.C. Cir. 1981), cert. denied, 455 U.S. 945 (1982). See also *Cornelius* v. *Nutt*, No. 83-1673 (June 24, 1985) slip op. 15; *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. 89, 92 (1983).

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[11] Under general labor law principles, the designation of a matter as a reserved management right does not exempt management's exercise of that right from restrictions imposed by applicable law and regulations. See, *e.g.*, Prasow & Peters, *Arbitration and Collective Bargaining* 31 (1970) ("Stated in an unqualified simplistic form, the reserved-rights theory holds that management's authority is supreme * * * in all areas except those where its authority is restricted by law." [footnote omitted]); Rabin, *Fibreboard and the Termination of Bargaining Unit Work: the Search for Standards in Defining the Scope of the Duty to Bargain*, 71 Colum. L. Rev. 803, 814 (1971) ("The 'management rights doctrine' is a valid rule of construction which holds that management is presumed to retain its unfettered common law right to run its business except as abridged by contract or statute."); Phelps, "Management's Reserved Rights: An Industry View," in *Proceedings of Ninth Annual Meeting of National Academy of Arbitrators*, 102, 105 (1956) ("In the absence of [a collective bargaining agreement narrowing management's reserved rights], management has absolute discretion in the hiring, firing, and the organization and direction of the working forces, subject only to such limitations as may be imposed by law.").

[12] See Elkouri and Elkouri, *Legal Status of Federal-Sector Arbitration*, supp. to *How Arbitration Works*, 3d ed., 13 (1980) ("The statutory words 'in accordance with applicable laws' do limit management rights, and this limitation would appear to be properly enforceable by contractual grievance and arbitration procedures. Apart from this, however, the statutory reservation of management rights necessarily reduces the scope of grievance-procedure or arbitral authority to disturb actions taken by agency management officials.").

Consequently, the fact that a bargaining proposal mentions a management right enumerated in Section 7106(a)(2), including the right to contract-out, does not of itself render the proposal nonnegotiable.[13] In order to determine whether such a proposal is within the statutory duty to bargain, the Authority examines the proposal to ascertain what effect, if any, it would have on management's exercise of its reserved authority. The Authority makes that examination based on the language of the proposal and the submissions of the parties. 5 U.S.C. 7117(c); 5 C.F.R. 2424.4-2424.7. See *Department of Treasury* v. *FLRA*, 707 F.2d 574, 579 (D.C. Cir. 1983); *NFFE, Local 1167* v. *FLRA*, 681 F.2d at 891.

The proposal in this case states: "The EMPLOYER agrees to comply with OMB Circular A-76, and other applicable laws and regulations concerning contracting-out" (Pet. App.

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[13] With respect to the interpretation to be given the management rights provision in the Statute, the House Committee Report stated:

> The committee's intention in section 7106 is to achieve a broadening of the scope of collective bargaining to an extent greater than the scope has been under the Executive Order program, but to preserve the essential prerogatives and flexibility Federal managers must have. The "management rights" language of Executive Order 11491 has been a substantial barrier against negotiations. The committee intends that section 7106—which retains several of management's rights under the Executive Order, but also eliminates several—be read to favor collective bargaining whenever there is doubt as to the negotiability of a subject or a proposal.

H.R. Rep. 95-1403, 95th Cong., 2d Sess. 43-44 (1978), *reprinted in Legis. Hist.* at 689-690.

As Representative Ford stated:

> It is our expectation and that of others supporting the substitute's management rights clause that such a clause will adequately protect genuine managerial prerogatives but that, construed strictly, such a clause will also allow the flexibility that is the hallmark of a successful labor-management program. Thus, although management has the right to direct the workforce, proposals aimed at lessening the adverse impact on employees of an exercise, perhaps arbitrary, of that right are fully negotiable.

124 Cong. Rec. 29199 (1978), *reprinted in Legis. Hist.* at 956. See also 124 Cong. Rec. 29187 (1978) (statement of Rep. Clay), *reprinted in Legis. Hist.* at 933.

40a).[14] As the Authority found, and the court below affirmed, this proposal does not establish any substantive criteria guiding EEOC's contracting-out determinations (Pet. App. 41a, 9a). Instead, the proposal echoes the existing statutory requirement that EEOC make its contracting-out determinations in accordance with applicable laws. Accordingly, any restrictions on EEOC's contracting-out authority stem not from the proposal but from external legal limitations with which EEOC is obligated to comply in any event.

The Authority has consistently held to be within the duty to bargain proposals which, like the one here involved, simply restate management's obligation to exercise its Section 7106(a)(2) rights in accordance with applicable laws and regulation. Thus, for example, the Authority has held negotiable a proposal that "[a]ll reductions in force will be carried out in strict compliance with applicable laws and regulations" (*AFGE Local 1692 and Department of the Air Force, Mather Air Force Base, California*, 8 F.L.R.A. 194 (1982) (provision 2)); a proposal which provided that work assignments not violate any relevant law, rule or regulations (*NFFE, Local 1497 and Department of the Air Force, Lowry Air Force Base, Colorado*, 9 F.L.R.A. 151 (1982) (union proposal 2)); and a proposal stating that involuntary job reassignments would only be made to promote the efficiency of the service and not to discriminate or punish, or for any reason that would violate law, rule, regulation or agreement (*AFGE, International Council of U.S. Marshals Service Locals and Department of Justice, U.S. Marshals Service*, 11 F.L.R.A. 672

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[14]The issue resolved by the Authority and litigated in the court below is whether EEOC is obligated to bargain over the proposal. Heretofore, EEOC has never suggested that it is not obligated to comply with the Circular. See EEOC's petition for rehearing to the court below, at 8: "[T]he EEOC does not dispute that it must comply with the terms of the Circular • • • ." The extent and the nature of the compliance obligation imposed by the Circular, a matter now raised by EEOC (Pet. Br. 24-29), was not an issue before the Authority and is not an issue that this Court must resolve in determining whether the Authority properly decided that the proposal is within the duty to bargain. In any event, those portions of the Circular which contain only guidance would not be subject to arbitral review. See discussion at 37 *infra*.

(1983) (union proposal 4)).[15] In each of these cases, the proposals were properly found negotiable because they did not establish any substantive limitation on the exercise of a management right.

On the other hand, the Authority has just as consistently found nonnegotiable proposals which impose substantive limitations of their own making on the exercise of management rights, even though those limitations may arguably appear benign. Thus, the Authority has found nonnegotiable a proposal that would have required contracting-out determinations to be "fair, equitable, and in accordance with established policy" because an arbitrator would not simply monitor compliance with mandatory portions of applicable laws and regulations but would instead substitute his or her judgment for that of the agency in areas reserved to management discretion. *AFGE, Local 3403 and National Science Foundation*, 6 F.L.R.A. at 673-675.[16] Similarly, the Authority has found proposed contract language nonnegotiable,

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[15] See also *AFGE, Local 1940 and Department of Agriculture, Plum Island Disease Center*, 16 F.L.R.A. No. 114 (1984) slip op. 5 n.6 (proposals limited to requiring that performance standards be established in accordance with applicable laws would be within the duty to bargain); *Delaware Army and Air National Guard*, 16 F.L.R.A. No. 66 (1984) (proposal 6) (proposal that management fill bargaining unit positions consistent with law is negotiable); *AFGE, Local 1858 and Army Missile and Munitions Center and School, Redstone Arsenal, Alabama*, 15 F.L.R.A. No. 59 (1985) (proposal that the ratio of civilian and military positions will be in accordance with agency regulation is negotiable); *ACT, New York State Council and State of New York, Division of Military and Naval Affairs, Albany, New York*, 11 F.L.R.A. 475 (1983) (proposal 1) (proposal that management act in accordance with merit system principles in 5 U.S.C. 2301 is negotiable); *IAM and AW, Local 2424 and Department of the Army, Aberdeen Proving Ground, Maryland*, 8 F.L.R.A. 679 (1982) (proposals 5 and 6) (proposals that management will minimize the adverse effect of contracting-out decisions in accordance with applicable laws are negotiable); *NTEU and IRS*, 3 F.L.R.A. 693 (1980) (proposals 2 and 3) (proposals that management act in accordance with merit system principles in 5 U.S.C. 2301 are negotiable).

[16] See also *NTEU, Chapter 204 and Federal Election Commission*, 19 F.L.R.A. No. 25 (1985) (proposal would have subjected management's determination as to which days employees should work to a test of "reasonableness"); *AFGE, Local 32 and Office of Personnel Management*, 16 F.L.R.A. No. 127 (1985) (proposal 3) (proposal requiring performance standards to be "fair and equitable" would have improperly permitted arbitrators to substitute their judgment as to the proper content of performance standards), petition for review filed *sub nom. Local 32, AFGE* v. *FLRA*, No. 85-1038 (D.C. Cir. Jan. 16, 1985).

even though it tracked the current language of the Circular, because it would require management to comply with that language "regardless of whether OMB subsequently revised or eliminated the directives/circulars from which they were taken." *NFFE, Local 1167 and Department of the Air Force, Headquarters, 31st Combat Support Group (TAC), Homestead Air Force Base, Florida,* 6 F.L.R.A. 574, 577 (1981), aff'd as to other matters *sub nom., NFFE v. Local 1167 FLRA,* 681 F.2d 886 (D.C. Cir. 1982).[17]

In determining that the proposal in this case is negotiable, the Authority properly applied the principle developed in the above cases involving contracting-out as well as other management rights in Section 7106(a)(2) of the Statute. Simply put, proposals which do no more than restate the obligation to adhere to whatever legal and regulatory requirements may be extant at the time are within the duty to bargain, but those proposals which impose their own criteria affecting the substantive exercise of management's reserved rights are nonnegotiable. In applying this distinction to negotiability determinations that Congress entrusted to be the primary function and responsibility of the Authority, the Authority has performed "its 'special function of applying the general provisions of [the Statute] to the complexities' of federal labor relations." *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA,* 464 U.S. 89, 97 (1983) (citation omitted). See also *Ford Motor Co.* v. *NLRB,* 441 U.S. 488, 496-497 (1979). The Authority's decision "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute," and this accommodation should not be disturbed "unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *Chevron, U.S.A., Inc.* v. *National Resources Defense Council, Inc.,* Nos. 82-1005, 82-1247 and 82-1591 (June 25, 1984) slip op. 6-7, *quoting United States* v. *Shimer,* 367 U.S. 374, 382, 383 (1961). The consistency of the Authority's decisional precedent in this negotiability area is a further reason that the Court should be particularly reluctant to hold that the Authority's interpretation of the Statute is impermissible. See *Pattern Makers' League of North America* v. *NLRB,* No. 83-1894 (June 27, 1985) slip op. 19-20.

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[17] See also cases cited in notes 9, 10, *supra.*

B. The Statute Does Not Exempt From The Scope Of The Negotiated Grievance Procedure Matters Relating To The Exercise Of Management's Contracting-Out Authority In Accordance With Applicable Legal Requirements

EEOC argues (Pet. Br. 17-22, 35-42) that even if the language of the proposal does not limit EEOC's authority to make contracting-out determinations, the effect of the proposal would be to hinder its exercise by subjecting such decisions to the negotiated grievance procedure mandated by Congress in Section 7121 of the Statute. However, EEOC's argument assumes that a complaint asserting that a contracting-out determination was not made in accordance with applicable legal requirements would not be grievable in the absence of the contract proposal. As the Authority properly found and the court below correctly affirmed, this assumption is contrary to the text and history of the Statute.

1. As stated in the House Committee Report, Congress enacted the Statute to "improve the civil service system, ensure adequate protection for employees against unlawful abuse by agency management, and provide a framework for labor-management relations in the Federal Government." H.R. Rep. 95-1403, 95th Cong., 2d Sess. 3 (1978), *reprinted in Legis. Hist.* at 679. In furtherance of these goals, Congress required that every collective bargaining agreement contain a negotiated grievance procedure which includes binding arbitration. 5 U.S.C. 7121. The Statute "prescribes those matters which * * * have to be submitted, as a matter of law, to the grievance procedures * * * unless the parties agree as part of the collective bargaining process that certain matters shall not be covered by the grievance procedures." H.R. Conf. Rep. 95-1717, 95th Cong., 2d Sess. 157 (1978), *reprinted in Legis. Hist.* at 825.

This Court has recognized that Section 7103(a)(9) of the Statute "broadly defines 'grievance'." *Cornelius* v. *Nutt*, No. 83-1673 (June 24, 1985) slip op. 15. The term grievance includes, among other things, any complaint by any employee concerning "any matter relating to the employment of the employee" (Section 7103(a)(9)(A)), or "any claimed violation, misinterpretation, or misapplication of any law, rule or regulation affecting conditions of employment * * * " (Section 7103(a)(9)(C)(ii)). See *AFGE, Locals 225, 1504, and 3723* v. *FLRA*, 712 F.2d at 641.

"[A]lthough this subsection [7103(a)(9)] is virtually all-inclusive in defining 'grievance,' section 7121 excludes certain grievances from being processed under a negotiated grievance procedure, thereby limiting the net effect of the term." H.R. Rep. 95-1403, 95th Cong., 2d Sess. 40 (1978), *reprinted in Legis. Hist.* at 686. See note 4, *supra*. See also *Andrade* v. *Lauer*, 729 F.2d 1475, 1487 n.22 (D.C. Cir. 1984) ("Congress demonstrated its care in defining the scope of the negotiated grievance procedures by defining several types of claims that it intended to keep outside the scope of the grievance procedure. *See* 5 U.S.C. §7121(c) (1982)."). As the court below correctly noted, contracting-out was not one of the five subjects Congress chose in Section 7121(c) of the Statute to exclude from coverage under the grievance mechanism (Pet. App. 12a). Thus, the language and the legislative history of the Statute constitute a "clear expression of congressional intent" with regard to the permissible scope of the negotiated grievance procedure under the Statute. See *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. at 99.

Despite the fact that Congress did not list contracting-out in Section 7121(c) as a subject excluded from the scope of the grievance procedure, EEOC nonetheless contends (Pet. Br. 35-42) that disputes concerning its compliance with applicable contracting-out requirements are not grievable or arbitrable. Indeed, EEOC's principle argument throughout this case has been that when the Statute designates a subject as a management right, the negotiated grievance procedure is not available to resolve disputes over whether management exercised that right within legal and regulatory requirements. Yet apparently even EEOC does not apply this proposition to all management rights since it accepts (see Pet. Br. 29-31) as appropriate grievances over such management rights as the right to discipline or the right to select for employment vacancies (which includes the right to promote employees).

The Statute's reservation of authority to management by operation of Section 7106(a) does not also thereby operate to remove complaints regarding allegedly improper exercise of that authority from the permissible scope of the negotiated grievance procedure. For example, the right to grieve management's compliance with applicable reduction-in-force rules and regulations under the negotiated grievance procedure is unquestioned, even though the authority to layoff employees is made nonnegotiable by

Section 7106(a)(2). See *Andrade* v. *Lauer*, 729 F.2d at 1484-1489 (D.C. Cir. 1984). Also, the right to grieve disciplinary actions under the negotiated grievance procedure is unchallenged, even though the right to take such actions is a nonnegotiable management right. 124 Cong. Rec. 29183 (1978), *reprinted in Legis. Hist.* at 924 and cited at Pet. App. 14a-15a. See also *Cornelius* v. *Nutt*, *supra*, slip op. 3.[18] Similarly, the right to grieve noncompliance with proper selection procedures under the negotiated grievance procedure is statutorily permissible, again by operation of Section 7103(a)(9)'s definition of grievance, even though the right to make selections for employee positions is nonnegotiable under Section 7106(a)(2)(C). *E.g.*, *AFGE, Local 12 and U.S. Department of Labor*, 15 F.L.R.A. No. 113 (1984); *Veterans Administration Hospital and AFGE, Lodge 2201*, 4 F.L.R.A. 419 (1980). Thus, Congress' decision to remove a matter from the duty to bargain cannot be equated with an intent to remove that matter from the scope of the negotiated grievance procedure as well.

Nevertheless, EEOC argues (Pet. Br. 38, 41 and n.22) that by using the language "nothing in this chapter shall affect" management's rights, Congress intended that Section 7106(a)(2) rights would be immune from application of the negotiated grievance procedure mandated by Section 7121 of the Statute. This argument improperly reads the phrase "nothing in this chapter" in isolation from the Statute's legislative history as well as from the remainder of Section 7106.[19]

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[18] Section 7121(c)(3) of the Statute sets forth an exception to the general right to grieve discipline. 5 U.S.C. 7121(c)(3). There, Congress exempted from the scope of the negotiated grievance procedure grievances concerning an employee's suspension or removal taken for national security reasons. This exemption demonstrates congressional awareness that the Statute's removal of a subject from the bargaining table did not also operate to remove complaints about the impermissible exercise of the subject from the grievance procedure. The authority to take discipline is reserved to management as nonnegotiable by Section 7106(a)(2)(A); yet, when Congress intended to remove an aspect of that nonnegotiable subject from the grievance procedure, it did so by writing an exemption in Section 7121(c)(3) from the grievance procedure. Congress could have done likewise for contracting-out matters, but did not.

[19] As stated by this Court in *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, 285 (1956), "If the above words are read in complete isolation from their context in the Act, such an interpretation is possible. However, '[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law and to its object and policy.'" (Citation omitted.)

The Statute's legislative history contradicts EEOC's assertion (Pet. Br. 38, 41) that the language "nothing in this chapter shall affect" was intended to do more than make the exercise of the listed rights nonnegotiable. The quoted language comes from the management rights provision of the bill reported out of the House Committee.[20] In discussing this provision, the House Committee Report stated that "[t]he effect of this section is to place limits on the number of subjects *about which agency management may bargain* with a labor organization."[21] See *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. at 92 ("The [Statute] excludes certain management prerogatives from the scope of negotiations, although an agency must bargain over the procedures by which these management rights are exercised. See §7106.").

Although several other management rights were added to Section 7106 of the House bill on the floor immediately prior to passage, the intent of the House remained unchanged; that is, that the management rights section preclude the parties only from bargaining over the exercise of the listed rights. See 124 Cong. Rec. 29183 (1978), *reprinted in Legis. Hist.* at 924. As stated by Representative Udall, who introduced this floor amendment expanding the number of management rights, the management rights section was "still to be treated narrowly as an exception to the general obligation to bargain over conditions of employment." *Ibid.* Further, Representative Udall stated: "[This amendment] preserves management's right to make the final decisions in these additional areas *in accordance with applicable laws, including other provisions of chapter 71 of title 5*. For example, management has the reserved right to make the final decision to 'remove' an employee, but that decision * * * would in no way affect the employee's right to appeal the decision through * * * the procedures set forth in a collective bargaining agreement."

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[20] H.R. 11280, 95th Cong., 2d Sess. § 7106(a) (1978) *reprinted in Legis. Hist.* at 391-392. The Senate bill paralleled the Executive Order language. S. 2640, 95th Cong., 2d Sess. §§ 7215(c), 7218(a) (1978), *reprinted in Legis. Hist.* at 578, 588-590.

[21] H.R. Rep. 95-1403, 95th Cong. 2d Sess. 43 (1978), *reprinted in Legis. Hist.* at 689 (emphasis added). This version of the House bill contained management's right "in accordance with applicable laws * * * to make determinations with respect to contracting out." See also note 13, *supra*.

Ibid., emphasis added.[22] The House-Senate Conference Committee adopted the House version of Section 7106—the version introduced by Representative Udall.[23]

Nothing in the pertinent legislative history demonstrates that Congress intended the management rights clause to take matters outside the grievance procedure in addition to making them nonnegotiable. Accordingly, EEOC's assertion that when the Statute designates a topic as a management right it not only removes the exercise of that right from collective bargaining but also removes grievances concerning that subject-matter from coverage under the negotiated grievance procedure is without merit.[24]

Moreover, EEOC's reliance on the phrase "nothing in this chapter shall affect" improperly reads the phrase in isolation from the other relevant statutory language. In its entirety, the contracting-out right in section 7106(a)(2)(B) of the Statute provides: "Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency • • • in accordance with applicable laws • • • to make determinations with respect to contracting out." 5 U.S.C. 7106(a)(2)(B). As discussed at 15-16, *supra*, this language does not provide for an unfettered exercise of management authority. The Statute makes management's exercise subject to subsection (b), which in Section 7106(b)(2) and (b)(3) imposes the affirmative obligation to negotiate procedures which management will observe in exercising its right and "appropriate arrangements" for

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[22] Read in context, Representative Udall's statement that "unions do not get much out of [the Statute] that is not already in the Executive order [.]" 124 Cong. Rec. 29182 (1978) (cited at Pet. Br. 33), refers to such matters as the right to strike, agency shop, and bargaining over wages, fringe benefits and retirement which were not included in the new law. 124 Cong. Rec. 29182, 29185 (1978), *reprinted in Legis. Hist.* at 923, 929. With regard to the matters relevant to this case, Representative Udall's statement in the text above is clear and specific. Moreover, with respect to what unions did gain, Representative Udall cited "guarantees about procedures that management must follow" and a broader scope of matters that can be arbitrated. 124 Cong. Rec. 29182 (1978), *reprinted in Legis. Hist.* at 923. See also *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. 89, 103 n.13.

[23] H.R. Conf. Rep. 95-1717, 95th Cong., 2d Sess. 153-154 (1978), *reprinted in Legis. Hist.* at 821-822. See *Department of Defense* v. *FLRA*, 659 F.2d 1140, 1156 (D.C. Cir. 1981), cert. denied, 455 U.S. 945 (1982).

[24] Moreover, as discussed at 22, *supra*, when Congress intended to remove from the grievance procedure an aspect of a management right, it created a specific exemption from the scope of the grievance procedure. See 5 U.S.C. 7121(c)(3).

employees adversely affected by the exercise of the right. See *AFGE, Local 2782* v. *FLRA*, 702 F.2d 1183 (D.C. Cir. 1983); *Department of the Air Force, United States Air Force Academy* v. *FLRA*, 717 F.2d 1314 (10th Cir. 1983). The Statute, by its express terms, also makes management's exercise subject to the obligation that it be done "in accordance with applicable laws."[25]

As Authority case law discussed above at 19 demonstrates, exercise of management discretion within the bounds of applicable law and regulation is not subject to review through the negotiated grievance procedure. Bargaining proposals that would invite arbitral encroachment on the exercise of discretion reserved to management consistently have been held nonnegotiable by the Authority. See cases cited at 19-20, *supra*. For example, the Authority has held that management's nonnegotiable authority to set employee performance standards means that no grievance procedure can be negotiated which would permit arbitral review of

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[25] Petitioner contends (Pet. Br. 20-21) that subjecting determinations regarding contracting-out to the grievance and arbitration mechanism will result in delay and added expense in the contracting-out process. As to the arbitrators' awards cited at Pet. Br. 20 n.9, no such expense has been incurred. In each case, the Authority has granted the agency's request for a stay of the award pending the Authority's resolution of the exceptions filed by the agency pursuant to 5 U.S.C. 7122. (Copies of the stay orders have been lodged with the Clerk of the Court and provided to counsel for the other parties.) Further, as to the time involved in the grievance and arbitration process, the Statute requires a negotiated grievance procedure to "provide for expeditious processing" (5 U.S.C. 7121(b)(2)); the parties may, of course, consistent with that requirement, negotiate applicable time limits for grievance and arbitration processing that meet their needs with respect to contracting-out or any other matters. In addition, parties may bargain to exclude matters from the scope of the negotiated grievance procedure. 5 U.S.C. 7121(a)(2).

In essence, EEOC's argument sets forth considerations that an agency might advance if it were to propose to negotiate an exclusion for contracting-out matters from the scope of the grievance procedure, or to suggest that Congress should exempt such matters by law. But even assuming the validity of such considerations, Congress chose not to add such a sixth exemption to the five exemptions enumerated in Section 7121(c) of the Statute. Instead, while Congress made contracting-out a management right, just as it made the right to take disciplinary action a management right, it exempted neither matter from permissible coverage by a negotiated grievance procedure. See *Gray* v. *Office of Personnel Management*, 771 F.2d 1504, 1511 (D.C. Cir. 1985) ("We can not and will not * * * add a statutory provision which the First Branch did not include.").

the establishment of the performance standards, as that would invite arbitrators to substitute their judgment for that of the agency in the exercise of the discretion reserved to the agency as nonnegotiable. *AFGE, Local 1968 and Department of Transportation, Saint Lawrence Seaway Development Corp., Massena, New York*, 5 F.L.R.A. 70, 77-82 (1981), aff'd *sub nom. AFGE, Local 1968* v. *FLRA*, 691 F.2d 565 (D.C. Cir. 1982), cert. denied, 461 U.S. 926 (1983). See also *NTEU* v. *FLRA*, 767 F.2d 1315, 1317-1318 (9th Cir. 1985).

Petitioner's contention (Pet. Br. 39 n.20) that the *AFGE, Local 1968* case, and the other cases cited at Pet. Br. 29, require a different result from the one herein ignores the critical distinction which Authority precedent consistently preserves. Whether it be in the area of contracting-out or employee performance standards, the Authority consistently has ruled that management retains the nonnegotiable prerogative to choose the criteria which govern the exercise of its rights. See, *e.g.*, *AFGE, Local 1923 and Health Care Financing Administration, Baltimore, Maryland*, 17 F.L.R.A. No. 96 (1985) (contracting-out); *Bureau of Engraving and Printing, U.S. Department of the Treasury and Washington Plate Printers Union, Local No. 2*, 20 F.L.R.A. No. 39 (1985) (performance standards). Not only has the Authority held nonnegotiable proposals which would allow arbitrators to substitute their judgment for that of management in the exercise of its right (see, *e.g.*, *AFGE, Local 3403 and National Science Foundation*, 6 F.L.R.A. at 673-675), but it has also granted management's exceptions to arbitral awards that would have given effect to a contract provision that infringed on the full scope of management authority. See *PATCO and FAA*, 5 F.L.R.A. 763 (1981) (contract provision granting immunity from discipline if employee properly reported air traffic incident; Authority modified award to retain to management its authority to discipline). Thus, even if a proposal were negotiated and then implemented by an arbitral award in a way that infringed on the exercise of the

discretion reserved to management by one of the management rights, the Statute ensures management the opportunity to secure appropriate relief from that award.[26]

On the other hand, the express terms of the Statute itself provide that the negotiated grievance procedure can address matters relating to the exercise of management's authority in accordance with applicable legal requirements, as that exercise relates to conditions of employment. 5 U.S.C. 7121 and 7103(a)(9). Bargaining proposals, like the one in this case, that do no more than restate this operative effect of the Statute are negotiable.

Congress did not remove the subject matter of contracting-out from the Statute's broad-scope negotiated grievance procedure. However, nothing in the Statute precludes EEOC or any other employing agency from proposing in collective bargaining to exclude contracting-out matters from the scope of the grievance procedure. Indeed, Congress authorized parties, as part of the collective bargaining process, to agree to exclude matters from the grievance procedure in addition to the five matters excluded by 5 U.S.C. 7121(c). 5 U.S.C. 7121(a)(2); *AFGE, Locals 225, 1504, and 3723* v. *FLRA*, 712 F.2d at 649. In doing so, Congress created a broad-scope grievance procedure as a starting point for parties to the collective bargaining process. If both parties do nothing to change it, the broad-scope procedure applies; if either party desires to add exclusions to the grievance procedure, the matter is subject to mandatory negotiations. *AFGE, Locals 225, 1504, and 3723* v. *FLRA*, 712 F.2d at 649.[27] Accordingly, through the collective bargaining process established by Congress, EEOC can seek to exclude matters related to contracting-out from

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[26] 5 U.S.C. 7122. See, *e.g.*, *U.S. Department of Justice, Immigration and Naturalization Service, Western Regional Office, San Pedro, California and AFGE, Local 2805*, 18 F.L.R.A. No. 20 (1985) (provision in parties' contract that assignment of training be equitable cannot be enforced because it interferes with agency's right to assign work under Section 7106(a)(2)(B)); *NTEU and U.S. Customs Service*, 17 F.L.R.A. No. 12 (1985) (provision in parties' contract that performance standards be "reasonable for each position" cannot be enforced because it interferes with agency's rights under Section 7106(a)(2)(A) and (B) to direct employees and assign work); *U.S. Department of Justice, Federal Prison System and AFGE, Local 1741*, 15 F.L.R.A. No. 178 (1984) (arbitral award vacating an employee's assignment and conditioning reassignment on a 60-day trial period must be set aside because it interferes with agency's right under Section 7106(a)(2)(A) to assign employees).

[27] For example, parties in the federal sector have excluded from the scope of the negotiated grievance procedure such matters as decisions on incentive

the grievance procedure. And, as the D.C. Circuit has noted, "[i]n collective bargaining, government managers are presumably competent to look out for government interests." *Department of Defense* v. *FLRA*, 659 F.2d 1140, 1157 (D.C. Cir. 1981), cert. denied, 455 U.S. 945 (1982).

In sum, as properly determined by the Authority and affirmed by the court of appeals, the proposal's effect of allowing matters concerning EEOC's adherence to applicable laws and regulations concerning contracting-out to be raised under the negotiated grievance procedure would not add a restriction to management's contracting-out authority because those matters would be grievable in any event by operation of the Statute, absent an exclusion negotiated by the parties.

2. EEOC advances two alternative arguments in support of its view that the scope of the negotiated grievance procedure cannot encompass questions as to whether EEOC exercised its contracting-out authority in accordance with applicable laws, rules, and regulations. Neither argument withstands analysis.

a. EEOC first contends (Pet. Br. 29-34) that even if by making contracting-out a management right Congress did not automatically remove that matter from the scope of the negotiated grievance procedure, contracting-out should be removed because it is different in character from other management rights over whose exercise grievances are permitted. EEOC argues (Pet. Br. 32) that contracting-out determinations bear only indirectly on the employer-employee relationship and that Congress intended arbitrators to resolve only disputes over subjects that are central to any system of labor management relations, such as discipline and promotions (Pet. Br. 31).[28]

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awards (*AFGE Local 547 and Tampa Veterans Administration Hospital*, 19 F.L.R.A. No. 87 (1985)) and matters for which a statutory appeals procedure exists (*U.S. Department of Housing and Urban Development and AFGE*, 12 F.L.R.A. 41 (1983)).

[28] EEOC argues (Pet. Br. 31-32) that this distinction was made under the pre-Statute program, citing two cases decided by the Federal Labor Relations Council. However, it is not clear that the Council fashioned such a distinction. See *AFGE, Local 2017 and Department of the Army, U.S. Army Signal Center and Fort Gordon, Fort Gordon, Georgia*, 5 F.L.R.C. 435, 437 (1977) (grievance concerning the assignment of military personnel to bargaining unit work). In any event, the plain language of the Statute and its legislative history constitute "clear expression of congressional intent" with regard to the permissible scope of the negotiated grievance procedure under the Statute. See *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. at 99.

EEOC's attempted distinction between those management rights over which grievances are permissible and others over which grievances should be impermissible is not based on the language of the Statute and is not supported by the Statute's legislative history. Not only is this argument raised late in the development of this case,[29] it is advanced late in the development of the law of labor arbitration which has long recognized that "[c]ontracting-out work is the basis of many grievances; and that type of claim is grist in the mills of arbitrators." *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584 (1960) (footnote omitted).

Management's nonnegotiable authority to make determinations with respect to contracting-out is set forth in the Statute along with such other rights as the authority to hire, direct, discipline and layoff employees, assign work, and select for employee vacancies. See 5 U.S.C. 7106(a)(2). In each case, management's authority is subject to the same affirmative obligation imposed by Section 7106(b)(2) and (b)(3) of the Statute. Further, in each case, management's authority is subject to the same obligation that it be exercised "in accordance with applicable laws." 5 U.S.C. 7106(a)(2). EEOC acknowledges (Pet. Br. 31) that the language of the Statute permits the negotiated grievance procedure to handle grievances over discipline and promotions. EEOC points to no language of the Statute which would make this result any different for the similarly situated right to make determinations with respect to contracting-out.

Nor does the Statute's legislative history provide any basis for concluding that alleged violations of law, rule, or regulation affecting conditions of employment are grievable when they concern some management rights but not others. EEOC's argument (Pet. Br. 32 n.15) that Congress "implicitly recognized" distinctions between the management rights, making some grievable and others not, rests entirely on the contention that because some rights were added on the House floor, whereas others were included in the House Committee bill, the rights added on the House floor were grievable while the others were not. Certainly

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[29] EEOC's argument was not raised before the Authority or the court of appeals, and therefore is not properly before the Court. 5 U.S.C. 7123(c). See, *e.g.*, *ILGWU* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975); *James* v. *Federal Energy Regulatory Commission*, 755 F.2d 154, 155-156 (Fed. Cir. 1985); *Department of Treasury* v. *FLRA*, 707 F.2d 574, 579 (D.C. Cir. 1983).

if Congress had so intended, it would in some way have expressed that intent. Instead, the language of the Statute treats these rights the same and there is no legislative discussion of a different treatment intended.

To the contrary, when Representative Udall introduced the floor amendment which added the new rights to Section 7106(a)(2), he emphasized that the language of section 7106(a)(2), while making these new rights nonnegotiable, also provided for their exercise "in accordance with applicable laws, including other provisions of chapter 71 of title 5." 124 Cong. Rec. 29183 (1978), *reprinted in Legis. Hist.* at 924. These "other provisions" included, of course, provisions (which were already in the bill at that time) establishing the broad-scope negotiated grievance procedure, subject to narrowing by the parties' negotiations. See H.R. 11280, 95th Cong., 2d Sess. § 7121, *reprinted in Legis. Hist.* at 419-421 and 124 Cong. Rec. 29180 (1978), *reprinted in Legis. Hist.* at 918. Moreover, in noting that his amendment increased the number of rights reserved to management, Representative Udall stated that "[t]his substitute strengthens the 'Management rights' section reported by the Committee, but it is still to be treated narrowly as an exception to the general obligation to bargain over conditions of employment." 124 Cong. Rec. 29183, *reprinted in Legis. Hist.* at 924. Thus, it is clear that Section 7106 addresses what matters are within or outside the duty to bargain, not what matters are or are not grievable.

Turning specifically to contracting-out, nothing in the language or the legislative history of the Statute supports EEOC's position that Congress viewed the exercise of this right as bearing only indirectly on employees so as to exempt that matter from the negotiated grievance procedure. To the contrary, the working text, from which the House Committee refined most of the labor-management provisions of the Committee bill (see *Department of Defense* v. *FLRA*, 659 F.2d at 1156 n.81), actually made contracting-out a negotiable condition of employment. H.R. 9094, 95th Cong., 1st Sess. § 7103(a)(16) (1977), *reprinted in Legis. Hist.* at 244. While the bill the House Committee reported out made the substantive exercise of contracting-out authority nonnegotiable, there is no suggestion that contracting-out's placement in Section 7106(a)(2) altered the fact, made obvious in the

bill which formed the basis for the Committee's working text, that contracting-out remained a condition of employment.[30]

EEOC's argument also draws no support from the law of labor arbitration in the private sector. In the Taft-Hartley Act, Congress established the federal policy favoring arbitration of labor disputes when it stated: "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." 29 U.S.C. 173(d). From this congressional statement of policy, this Court enunciated "the now well-known presumption of arbitrability for labor disputes":[31]

> An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage. [Footnote omitted.]
>
> • • • • •
>
> In the absence of any express provision excluding a particular grievance from arbitrtion, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail • • • ."

Steelworkers v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-583, 584-585 (1960). Finally, in circumstances in which the parties' contract language excluded from arbitration matters which were "strictly a function of management," the Court found within the presumption of arbitrability a grievance over contracting-out. *Id.* at 584.

For the federal sector, Congress likewise established a strong policy favoring arbitration of labor disputes. As noted at 21, *supra*, every collective bargaining agreement in the federal sector is required to have a negotiated grievance procedure including binding arbitration (5 U.S.C. 7121(a), (b)(3)(C)). Congress

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[30] Similarly, in the private sector contracting-out is a condition of employment. *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203 (1964).

[31] *Gateway Coal Co.* v. *United Mine Workers*, 414 U.S. 368, 377 (1974). See *Allis-Chalmers Corp.* v. *Lueck*, No. 83-1748 (Apr. 16, 1985) slip op. 17. See also *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, Nos. 83-1569, 83-1733 (July 2, 1985) slip op. 10-12 (commercial arbitration).

prescribed a broad-scope grievance procedure in the federal sector, with the exceptions being those five subjects specifically enumerated by Congress (5 U.S.C. 7121(c)) or those which the parties specifically bargain to exclude (5 U.S.C. 7121(a)(2)). *AFGE, Locals 225, 1504, and 3723* v. *FLRA*, 712 F.2d at 648 n.34.

In sum, the provisions of the Statute strongly support the conclusion that disputes over management's compliance with applicable contracting-out requirements are arbitrable.[32] There is no basis in the Statute, its legislative history, or under general labor law principles to support EEOC's contention that contracting-out has only an indirect effect on employees and therefore disputes over management's exercise of its contracting-out authority should be nongrievable.

b. EEOC further argues (Pet. Br. 24-29) that even if contracting-out is a matter encompassed by the broad-scope negotiated grievance procedure, compliance issues relating to the Circular are inappropriate for resolution under that procedure because the Circular is not a law, rule, or regulation (Pet. Br. 37), and as such it is "binding" only in the sense that the President may choose to remove an Executive Branch officer who disregards its direction (Pet. Br. 24).[33] However, as the Authority stated in denying EEOC's request for reconsideration (FLRA App. 2a), the extent of the compliance obligation imposed by the Circular is essentially a question of arbitrability. And that question need not be resolved in order to determine the negotiability of the instant proposal. See note 14, *supra*.

Further, EEOC's assertion that the Circular is not a law, rule, or regulation rests principally on cases holding that alleged violations of the Circular are not judicially cognizable.[34] But

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[32] The fact that management's exercise of its authority with respect to a number of conditions of employment in the federal sector is outside the duty to bargain because the conditions of employment are management rights precludes an arbitrator from reviewing management's exercise of discretion in these areas (see 19, *supra*), but as discussed at 22-23, *supra*, it does not narrow the scope of the negotiated grievance procedure.

[33] EEOC's argument only disputes the negotiability of the portion of the proposal referencing the Circular; it leaves unchallenged the negotiability of the language of the proposal requiring EEOC's compliance with "other applicable laws and regulations," *e.g.*, 48 C.F.R. Ch. 1 (cited by EEOC at Pet. Br. 9 n.4).

[34] For example, *Local 2855, AFGE* v. *United States*, 602 F.2d 574, 582 n.28 (3d Cir. 1979) stated that because the Circular "appear[s] to be primarily a

whether an alleged violation of a rule or regulation is judicially cognizable is inapposite to whether a matter alleging that an agency did not adhere to applicable legal requirements in exercising its authority is subject to the negotiated grievance procedure Congress established for collective bargaining agreements. See, *e.g., Carducci* v. *Regan,* 714 F.2d 171 (D.C. Cir. 1983) (finding no judical review available for an employee reassignment based on "poor performance," a matter clearly within the range of matters the Statute makes grievable under a negotiated grievance procedure). Moreover, there is no dispute that EEOC must comply with the Circular. See note 14, *supra.*[35]

EEOC contends (Pet. Br. 24-26, 37), again for the first time in this case, that grievances over alleged noncompliance with the Circular cannot be pursued under a negotiated grievance procedure because the Circular is not a "rule or regulation" within

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loose managerial tool for implementing the government's stated policy of relying whenever possible on private concerns to supply its needs," it cannot appropriately be seen as "creat[ing] a legally enforceable standard." However, the "loose managerial tool" referred to is not the current Circular, but the pre-1979 Circular. In 1979, Supplement No. 1 to the Circular, the *Cost Comparison Handbook,* explained why revisions were being made to the Circular:

> As Government cost accounting techniques progressed, it became obvious that Circular A-76 guidelines were too general to achieve desirable uniformity, and were insufficient as a basis for comprehensive cost studies.
>
> • • • • •
>
> Detailed instructions for making a cost comparison are set forth in this Handbook for use by all Federal agencies.

Cost Comparison Handbook, at 1, 2. The *Handbook* was also intended "to establish consistency, assurance that all substantive factors are considered when making cost comparisons, and a desirable level of uniformity among agencies in comparative cost analyses." *Id.* at 1. Thus, the revised Circular was specifically designed to remedy the "looseness" of the pre-1979 Circular. In fact, the requirement in the 1979 Circular that agencies establish an appeals procedure (44 Fed. Reg. 20561 (1979)) is a further indication that the Circular imposes requirements against which compliance can be measured.

[35] The Circular was published for notice and comment in the Federal Register prior to adoption. 43 Fed. Reg. 37410 (1978); 48 Fed. Reg. 1376 (1983). The Circular is enacted, as its Section 3 states (48 Fed. Reg. 37115 (1983)), under the authority of the Budget and Accounting Act of 1921 (31 U.S.C. 1 *et seq.*) and the Office of the Federal Procurement Policy Act of 1979 (41 U.S.C. 401 *et seq.*). An agency is obligated to comply with the Circular because, quite simply, the Circular by its own terms requires compliance. OMB Circular No. A-76 (Revised), paragraph 9. 48 Fed. Reg. 37115 (1983).

the meaning of Section 7103(a)(9)(C)(ii) of the Statute.[36] While Congress did not elaborate on the meaning of "rule or regulation" for purposes of that section, the House-Senate Conference Report did specifically intend, with regard to the meaning of "rule or regulation" as used in Section 7117(a) of the Statute, that the term "be interpreted as including official declarations of policy of an agency which are binding on officials and agencies to which they apply." H.R. Conf. Rep. 95-1717, 95th Cong., 2d Sess. 158, *reprinted in Legis. Hist.* at 826. OMB Circular A-76 meets this definition of "rule or regulation," as EEOC (Pet. Br. 43) has acknowledged, and as the Authority has held. *AFGE, Local 1923 and Health Care Financing Administration, Baltimore, Maryland,* 17 F.L.R.A. No. 96 (1985) slip op. 6; *AFGE, Local 225 and Department of the Army, U.S. Army Management Research and Development Command, Dover, New Jersey,* 17 F.L.R.A. No. 66 (1985) slip op. 4.

Petitioner argues (Pet. Br. 43 n.23), however, that Congress intended a different meaning for "rule or regulation" when it intended to restrict bargaining (in Section 7117(a)) as opposed to when it intended to expand employee rights by bringing alleged violations of "rules or regulations," as those violations affected conditions of employment, within the negotiated grievance procedure (Section 7103(a)(9)(C)(ii)). EEOC provides no support for this contention. In the absence of any such indication, it is reasonable to conclude that Congress intended the same terms to have the same meaning in the same statute. See, *e.g., Finnegan* v. *Leu,* 456 U.S. 431, 438 and n.9 (1982).[37]

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[36] Even if the Circular were not a rule or regulation, contracting-out disputes could still be matters "relating to the employment of * * * employee[s]," bringing them within the scope of the negotiated grievance procedure by operation of the definition of grievance contained in Section 7103(a)(9)(A) and (B) of the Statute. 5 U.S.C. 7103(a)(9)(A) and (B).

[37] Moreover, notwithstanding EEOC's contention (Pet. Br. 43 n.23) that "rules or regulations" cannot include the Circular whenever that would serve to expand employee rights, the Office of Management and Budget extended to federal sector unions national consultation rights over the Circular in accordance with the requirement in Section 7117(d)(1) that such rights be accorded by "any agency with respect to any Government-wide rule or regulation issued by the agency effecting any substantive change in any condition of employment." 5 U.S.C. 7117(d)(1). National consultation rights enable unions holding exclusive recognition for at least 3,500 employees to provide comments to the issuing agency on proposed government-wide regulations affecting conditions of employment. See 5 C.F.R. 2426.11-2426.13.

At bottom, EEOC's argument that the Circular is not the kind of rule or regulation which can be subject to Section 7121 misapprehends how Congress intended the grievance procedure in collective bargaining agreements to operate in the federal sector.[38] Notwithstanding EEOC's contentions (Pet. Br. 21-22) about the role of arbitrators in the private sector, in the federal sector Congress made it clear that "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment * * * " constitutes a grievance, and that consequently arbitrators would be required to consider laws, rules, and regulations. 5 U.S.C. 7103(a)(9); *Andrade* v. *Lauer*, 729 F.2d at 1488-1489.[39] Further, Congress empowered the Authority to resolve exceptions to arbitral awards to ensure that such awards conform to applicable laws, rules, and regulations. 5 U.S.C. 7122(a)(1).[40] Accordingly, the Circular represents the kind of rule or regulation that Congress intended to be within the

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[38] See Elkouri and Elkouri, *Legal Status of Federal-Sector Arbitration*, supp. to *How Arbitration Works*, 3d ed., 7 (1980) ("Arbitral disposition of federal-sector grievances will often be governed or materially affected by laws, rules, and regulations apart from the collective bargaining agreement[.]"). See also Gentile, "Arbitration in the Federal Sector: Selected Problem Areas," 34 *Labor Law Journal* 482, 484 (1983); Harkless, "Comment, Grievance Arbitration in the Federal Service," in *Proceedings of Thirty-Fourth Annual Meeting of National Academy of Arbitrators*, 206, 209 (1982).

[39] See Elkouri and Elkouri, *Legal Status of Federal-Sector Arbitration*, supp. to *How Arbitration Works*, 3d ed., 6-7 (1980) ("The basic function of the grievance procedure and arbitration in private employment is to assure compliance with the collective bargaining agreement. While this is also a key function of the grievance procedure and arbitration in the federal sector, there they have dual basic roles. The second and also very important function of the grievance procedure and arbitration in the federal sector is to review or police compliance with controlling laws, rules, and regulations by federal agency employers and employees alike [footnote omitted]."). The grievance mechanism encompasses not only formal rules but also, for example, provisions of the Federal Personnel Manual. See, *e.g.*, *Veterans Administration Medical Center, Fort Howard and AFGE, Local 2146*, 5 F.L.R.A. 250 (1981) (the arbitrated issue was whether the agency had failed to comply with Appendix J to Federal Personnel Manual Supplement 532-1 in denying employees 4% environmental differential pay).

[40] The Authority's responsibility to ensure that arbitrators' awards to which exceptions are taken conform to applicable legal requirements exemplifies Congress' effort "to establish procedures which are designed to meet the special requirements and needs of the Government." 5 U.S.C. 7101(b).

permissible scope of negotiated grievance procedures, insofar as a complaint concerning the rule or regulation affects conditions of employment of bargaining unit employees.

In the alternative, EEOC argues (Pet. Br. 26-29) that even if the Circular is a rule or regulation within the meaning of the Statute, the Circular does not, as a practical matter, limit the exercise of management's discretion in any meaningful sense so as to provide a basis for arbitral review. Of course, the Circular does contain aspects involving the exercise of management's discretion, and those aspects would not be subject to arbitral review. See discussion at 19, *supra*. But to argue, as EEOC does (Pet. Br. 23), that "the Circular does not impose any identifiable constraints on management" ignores the language of the Circular.[41]

C. The Circular's Appeals Procedure Cannot Override The Operation Of The Statute's Grievance Machinery

Finally, EEOC's contention (Pet. Br. 34-35, 42-47) that the Circular itself bars negotiation over the proposal is without merit. EEOC contends in this regard that Section 7117(a)(1) of the Statute bars negotiations not only over proposals that are inconsistent with a government-wide rule or regulation (Pet. Br. 42-46), but also over proposals that share the same subject matter as a government-wide rule or regulation (Pet. Br. 46-47). However, as this Court has recognized, Section 7117(a)(1) does not preclude bargaining "unless a bargaining proposal is inconsistent with existing federal law, rule, or regulation." *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U.S. at 92. See also *Department of the Treasury, U.S. Customs Service* v. *FLRA*, 762 F.2d

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[41] For example, Part IV of the Circular's 1983 Supplement is the seventy-odd page *Cost Comparison Handbook* which "provides detailed instructions for developing a comprehensive comparison of the estimated cost" of in-house versus contract performance and the procedures "are intended to establish a practical level of consistency and uniformity to assure all substantive factors are considered when making cost comparisons." *Cost Comparison Handbook*, at 1. The Circular and its Supplement specify figures to be used in the cost comparison process, ranging from retirement costs for federal employees (50 Fed. Reg. 32812 (1985)) to the useful life to be attached to various classes of equipment (*Cost Comparison Handbook*, at 21). Moreover, to the extent that there are discretionary aspects in the Circular, those aspects would not be subject to arbitral review. See discussion at 19, *supra*.

1119, 1122 (D.C. Cir. 1985); *Library of Congress* v. *FLRA*, 699 F.2d at 1284 n.16; *Department of Defense, Department of the Army* v. *FLRA*, 685 F.2d at 644.

Additionally, the legislative history of Section 7117(a)(1) makes clear that Congress intended only to bar negotiation over proposals that would bring about inconsistencies with law, rule, and regulation. In describing what is now Section 7117(a)(1) of the Statute, the House-Senate Conference Report stated that "[b]oth the House and Senate authorize negotiations except to the extent inconsistent with law, rules, and regulations * * * ." H.R. Conf. Rep. 95-1717, 95th Cong., 2d Sess. 158, *reprinted in Legis. Hist.* at 826.

Moreover, a broader reading of the bar to negotiations contained in Section 7117(a)(1) would not make sense in the federal sector labor relations program. Many subjects in federal sector bargaining agreements are also the subject of a government-wide rule or regulation, *e.g.*, health and safety (29 C.F.R. 1960); employee performance appraisal procedures (5 C.F.R. 430); reduction-in-force procedures (5 C.F.R. 351); adverse action procedures (5 C.F.R. 752). If collective bargaining were allowed only over proposals that did not address the same subject matter as a government-wide rule or regulation, it is questionable what would be left of the collective bargaining obligation created by the Statute in light of the myriad of government-wide rules or regulations covering a large number of subjects. No court has endorsed such a construction of Section 7117(a)(1).

EEOC additionally argues (Pet. Br. 42-46), however, that Section 7117(a)(1)'s acknowledged bar over proposals that would bring about results inconsistent with government-wide rule or regulation applies to the instant proposal. Specifically, EEOC argues (Pet. Br. 6, 44) that the Circular's statement that its provisions "shall not be construed to create" any new right of appeal is inconsistent with the negotiated grievance procedure, which would be brought into play by operation of the proposal. However, this application of Section 7117(a)(1) to the instant proposal must be rejected for two reasons.

First, the proposal is not inconsistent with the Circular because the proposal does not "create" any new right of appeal. The Circular specifies that the terms of the Circular "shall not be construed to create[ ] any substantive or procedural" right of appeal (44 Fed. Reg. 20558 (1979)); however, the right to file

grievances regarding contracting-out is created not by the Circular but by the broad-scope negotiated grievance procedure authorized by Congress in the Statute. 5 U.S.C. 7103(a)(9) and 5 U.S.C. 7121(a). See *AFGE, Locals 225, 1504, and 3723* v. *FLRA*, 712 F 2d at 649. As the Authority properly determined and the court of appeals correctly affirmed, the Statute itself, not this proposal, brings contracting-out determinations within the ambit of the negotiated grievance procedure.

Second, even assuming that there is an inconsistency between the grievance procedure the Statute prescribes for collective bargaining agreements and the grievance procedure set forth in the Circular, there is no indication in the Statute or elsewhere that Congress intended to allow agencies to limit by regulation the statutorily defined grievance procedure. See *AFGE, Local 2782 and Department of Commerce, Bureau of the Census, Washington, D.C.*, 6 F.L.R.A. 314, 322 (1981) (Office of Personnel Management regulation limiting right to grieve nonselection of a repromotion eligible cannot be applied in a manner inconsistent with the scope of negotiated grievance procedures allowed under Section 7121 of the Statute). See also *NTEU* v. *Cornelius*, No. 85-0129 (D.D.C. July 15, 1985) slip op. 12-13, appeal docketed, No. 85-5938 (D.C. Cir. Sept. 10, 1985) ("[The Statute] does not permit [the Office of Personnel Management] to regulate away an appeals procedure granted by Congress ." [Footnote omitted.]). As the court below recognized, to allow the text of the Circular to restrict the statutory scope of grievances would place "limitations in the statute not placed there by Congress." *Colgate-Palmolive Peet Co.* v. *NLRB*, 338 U.S. 355, 363 (1949). While a government-wide regulation bars negotiations over a proposal through which a party would acquire rights that are inconsistent with the regulation, Section 7117(a)(1) does not authorize government-wide regulations to remove the entitlement specifically conferred by Section 7121 of the Statute. Indeed, the logical extension of EEOC's argument would allow an agency that has the authority to issue government-wide rules to alter provisions of the Statute.[42]

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[42] EEOC argues (Pet. Br. 45-46) that courts have previously removed disputes from the jurisdiction of the negotiated grievance procedure. However, in each case cited by EEOC, it has been the result of a conflict between two separate statutes over the rights flowing to a specific category of employees.

Finally, EEOC argues (Pet. Br. 34-35) that in order for management to be able to make its contracting-out determinations in accordance with applicable laws, as required by Section 7106(a)(2) of the Statute, it must be able to comply with not just the substantive aspects of the Circular, but with all aspects of the Circular, including its appeals procedure. EEOC argues (Pet. Br. 34-35) that the proposal prevents EEOC from so complying and therefore interferes with the obligation imposed by Section 7106(a)(2).

This argument ignores the fact that Congress prescribed a statutory broad-scope negotiated grievance procedure which, as set forth at 39, *supra,* cannot be restricted by the Circular. Moreover, this argument incorrectly suggests that the Circular's appeals procedure is part of the way in which management makes its contracting-out determinations in accordance with applicable law. The appeals procedure is not how management exercises its authority to make contracting-out determinations; rather, the appeals procedure is a separate vehicle offered to parties, other than management, who believe they have been aggrieved because management has already made a contracting-out determination not in accordance with applicable law, rule, and regulation. 44 Fed. Reg. 20558 (1979); 48 Fed. Reg. 37114 (1983).

In sum, the proposal is within the duty to bargain. The Circular does not, by its own terms or through the operation of Section 7117(a)(1) of the Statute, curtail the permissible reach established by Congress for the negotiated grievance procedure.

No court has removed a general subject matter from the scope authorized by Congress for negotiated grievance procedures. Of course, Congress could have chosen to exclude matters relating to contracting-out determinations from the permissible scope of a negotiated grievance procedure. The simple fact, however, is that it did not do so. Petitioner's argument is more appropriately directed to Congress. See, *e.g., AFGE, Council of Prison Locals, Local 1286* v. *United States Department of Justice,* 738 F.2d 742, 747 (6th Cir. 1984); *Council of Prison Locals* v. *Brewer,* 735 F.2d 1497 1502 n.9 (D.C. Cir. 1984).

CONCLUSION

The judgment of the court of appeals should be affirmed.[43]
Respectfully submitted.

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NOVEMBER 1985

[43] The Solicitor General authorizes the filing of this brief by Respondent Federal Labor Relations Authority.

APPENDIX A

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, AFL-CIO,
NATIONAL COUNCIL OF EEOC
LOCALS

Union

and

Case No. O-NG-314
10 FLRA No. 1

EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION

Agency

ORDER DENYING REQUEST FOR RECONSIDERATION
OF DECISION ON NEGOTIABILITY ISSUE

This matter is before the Authority on a request by the Equal Employment Opportunity Commission for reconsideration of the Authority's decision as to Union Proposal 1 in *American Federation of Government Employees, AFL-CIO, National Council of EEOC Locals and Equal Employment Opportunity Commission*, 10 FLRA No. 1 (1982). The Union filed an opposition to the Agency's request.

In relevant part, the Authority held in *Equal Employment Opportunity Commission* that, contrary to the Agency's claim, Union Proposal 1 would not affect the scope and coverage of the parties' negotiated grievance procedure since a contractual provision to comply with applicable laws and regulations concerning contracting-out does not itself change the scope and coverage of the parties' grievance procedure beyond that which is authorized under the Statute. In so holding, the Authority emphasized that under the Statute disputes concerning conditions of employment arising in connection with the application of

OMB Circular A-76 and other applicable laws and regulations concerning contracting out would be covered by the negotiated grievance procedure unless the particular grievance is inconsistent with law or the parties exclude such grievances through negotiations.

In seeking reconsideration, the Agency requests that the Authority "explain in what fashion OMB Circular A-76 and other applicable laws and regulations concerning contracting out fall within the ambit of . . . the grievance resolution machinery under the Statute." The Authority finds that such a request does not establish "extraordinary circumstances" warranting reconsideration as required under section 2429.17 of the Authority's Rules and Regulations.* Rather, the Agency in essence is asking the Authority to make arbitrability determinations in the absence of a specific factual context. To the extent that an arbitrability question may arise in the future, the Agency may, of course, avail itself of the procedures set forth in section 7121 of the Statute for the resolution of such questions. Accordingly, IT IS ORDERED that the Agency's request for reconsideration of the Authority's decision in the instant case be, and it hereby is, denied.

Issued, Washington, D.C., March 18, 1983

Ronald W. Haughton, Chairman

Henry B. Frazier III, Member

Leon B. Applewhaite, Member

FEDERAL LABOR RELATIONS AUTHORITY

* Section 2429.17 provides, in pertinent part:

> After a final decision or order of the Authority has been issued, a party to the proceeding before the Authority who can establish in its moving papers extraordinary circumstances for so doing, may move for reconsideration of such final decision or order. . . . A motion for reconsideration shall state with particularity the extraordinary circumstances claimed and shall be supported by appropriate citations. . . .

APPENDIX B

5 U.S.C. 7103(a) provides:

§7103. Definitions; application

(a) For the purpose of this chapter—

* * * * *

(9) "grievance" means any complaint—

(A) by any employee concerning any matter relating to the employment of the employee;

(B) by any labor organization concerning any matter relating to the employment of any employee; or

(C) by any employee labor organization, or agency concerning—

(i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or

(ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment;

* * * * *

(14) "conditions of employment" means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters—

(A) relating to political activities prohibited under subchapter III of chapter 73 of this title;

(B) relating to the classification of any position; or

(C) to the extent such matters are specifically provided for by Federal statute[.]

* * * * *

5 U.S.C. 7106 provides:

§7106. Management rights

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—

(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

(2) in accordance with applicable laws—

(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

(C) with respect to filling positions, to make selections for appointments from—

(i) among properly ranked and certified candidates for promotion; or

(ii) any other appropriate source; and

(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

(b) Nothing in this section shall preclude any agency and any labor organization from negotiating—

(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

5 U.S.C. 7117(a)(1) provides:

§7117. Duty to bargain in good faith; compelling need; duty to consult

(a)(1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

* * * * *

5 U.S.C. 7121(a)-(c) provides:

§7121. Grievance procedures

(a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d) and (e) of this section, the procedures shall be the exclusive procedures for resolving grievances which fall within its coverage.

(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

(b) Any negotiated grievance procedure referred to in subsection (a) of this section shall—

(1) be fair and simple,

(2) provide for expeditious processing, and

(3) include procedures that—

(A) assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;

(B) assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and

(C) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency.

(c) The preceding subsections of this section shall not apply with respect to any grievance concerning—

(1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);

(2) retirement, life insurance, or health insurance;

(3) a suspension or removal under section 7532 of this title;

(4) any examination, certification, or appointment; or

(5) the classification of any position which does not result in the reduction in grade or pay of an employee.

* * * * *